Supreme Court, U.S.
FILED
95-470 SEP 20 1995
OFFICE OF THE CLERK

No._____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

UNITED EMPLOYER BENEFIT CORPORATION,
Petitioner,

v.

THE DEPARTMENT OF CONSUMER AND BUSINESS SERVICES OF THE STATE OF OREGON, and QUAL-MED OREGON HEALTH PLAN, INC., an Oregon domiciled corporation,
Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

Richard A. Uffelman
Portland, Oregon

David F. Sugerman
PAUL & SUGERMAN
Portland, Oregon

Attorneys
for Petitioner

Nancie G. Marzulla*
Lisa M. Jaeger
Joseph G. Cosby
DEFENDERS OF
PROPERTY RIGHTS
6235 33rd Street, NW
Washington, DC 20015
(202) 686-4197

*Counsel of Record

Questions Presented

1. Whether Government can by threats of future actions that have the effect of destroying a thriving business avoid the duty to pay just compensation?

2. Whether personal property is entitled to less protection than land against uncompensated takings?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iv

OPINIONS AND ORDERS BELOW.....3

JURISDICTION.....3

CONSTITUTIONAL PROVISIONS INVOLVED.....4

STATEMENT OF THE CASE.....4

PROCEEDINGS BELOW.....6

REASONS FOR GRANTING THE WRIT.....7

I. THIS COURT, CIRCUIT COURTS, AND STATE COURTS ARE HOPELESSLY CONFUSED OVER WHETHER PERSONAL PROPERTY IS PROTECTED AGAINST UNCOMPENSATED REGULATORY TAKINGS.....7

A. THIS COURT'S DECISIONS HAVE CREATED UNCERTAINTY ABOUT WHETHER PERSONAL PROPERTY OWNED BY THOSE ENGAGED IN HEAVILY REGULATED INDUSTRY IS PROTECTED TO THE SAME EXTENT AS LAND AGAINST REGULATORY TAKINGS.....9

TABLE OF CONTENTS -- Continued

B. THE FEDERAL AND D.C. CIRCUITS ARE SPLIT ON THE ISSUE OF WHETHER PERSONAL PROPERTY HELD BY THOSE ENGAGED IN HEAVILY REGULATED INDUSTRIES IS ENTITLED TO THE SAME PROTECTION AS REAL PROPERTY.....13

C. CONSTITUTIONAL SCHOLARS HAVE CALLED UPON THIS COURT TO EXTEND THE SAME LEVEL OF PROTECTION TO BOTH REAL AND PERSONAL PROPERTY IN CASES INVOLVING HEAVILY REGULATED INDUSTRIES.....17

II. THIS COURT SHOULD GRANT THE PETITION TO DETERMINE WHETHER GOVERNMENT THREATS OF FUTURE ACTIONS WHICH HAVE THE EFFECT OF DESTROYING A THRIVING BUSINESS CONSTITUTES A TAKING OF PRIVATE PROPERTY UNDER THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT.....19

CONCLUSION.....28

TABLE OF AUTHORITIES

CASES

Armstrong v. United States, 364 U.S. 40 (1960).....11

Allied-General Nuclear Services, 839 F.2d 1572 (Fed. Cir. 1988).....13, 14

Bagett v. Bullitt, 377 U.S. 360 (1964).....24

Connolly v. Pension Benefit Guaranty Corp., 475 U.S. 211 (1986).....12

Concrete Pipe of Calif. v. Laborers Pension Tr., 113 S. Ct. 2264 (1993).....12

Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 197 F.2d 648 (D.C. Cir. 1992).....13, 15

Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).....26

General Offshore Corp. v. Farrelly, 743 F. Supp. 1177 (D.V.I. 1990), *aff'd*, 919 F.2d 17 (3d Cir. 1990).....16

Ghen v. Rich, 8 F. 159 (D. Mass. 1881).....16

Hall v. Ford, 856 F. 2d 255 (D.C. Cir. 1988).....17

Kaiser Aetna v. United States, 444 U.S. 164 (1979).....16

Keyishian v. Board of Regents, 385 U.S. 589 (1967).....24

TABLE OF AUTHORITIES -- Continued

Knight v. City of Missoula, 827 P.2d 1270 (Mont. 1992).....26

Lamont v. Postmaster General, 381 U.S. 301 (1965).....24, 27

Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).....11

Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).....passim

Lynch v. United States, 292 U.S. 571 (1934).....11

Mitchell Arms, Inc. v. United States, 7 F.3d 212 (1993), *cert denied*, 114 S. Ct. 2100 (1994).....15

New York Times Co. v. Sullivan, 376 U.S. 254 (1964).....23

New York Times Co. v. United States, 403 U.S. 713 (1971).....24

Nixon v. United States, 978 F.2d 1269 (D.C. Cir. 1992).....16

Perry v. Sindermann, 408 U.S. 593 (1972).....16

Ruckleshaus v. Monsanto Co., 467 U.S. 986 (1984).....10, 12

Suess Builders Co. v. City of Beaverton, 656 P.2d 306 (1982).....8, 22, 23

TABLE OF AUTHORITIES --Continued

Tari v. Collier County, 56 F.3d 1533 (2d Cir. 1995).....26

United States v. General Motors, Corp., 323 U.S. 373 (1945).....12

United States v. Security Industrial Bank, 459 U.S. 70 (1982).....12

Williamson County Regional Planning Commission v. Hamilton Bank, 473 U.S. 172 (1985).....25, 26

Washington Market Enterprises v. City of Trenton, 343 A.2d 408 (1975)..... ..21, 25

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980).....10, 11

Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990).....14

CONSTITUTIONS

U.S. Const. art. V.....passim

U.S. Const. art. XIV.....passim

STATUTES

28 U.S.C. § 1491 (a)(1).....13

TABLE OF AUTHORITIES -- Continued

TREATISES

2 William Blackstone, Commentaries at 405.....10

Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations*, 45 Stan. L. Rev. 1369 (1992).....18

William W. Fisher III, *The Trouble With Lucas*, 45 Stan. L. Rev. 1393 (1992).....19

Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation*, 48 Notre Dame Lawyer 765 (1973).....25

Richard Lazarus, *Putting the Correct 'Spin' on Lucas*, 45 Stan. L. Rev. 1411 (1992).....18

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1995

UNITED EMPLOYER BENEFIT CORPORATION,[1]

Petitioner,

v.

THE DEPARTMENT OF INSURANCE AND FINANCE OF THE STATE OF OREGON and QUAL-MED OREGON HEALTH PLAN, INC., an Oregon domiciled corporation,

Respondents.[2]

Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

[1] All parties in the court below are listed in the caption in this Court. Pursuant to Rule 29.1 of this Court, Petitioner has no parent companies nor any non-wholly owned subsidiaries.

[2] Because the issues addressed in this Petition arise under the Fifth and Fourteenth Amendments to the Constitution and stem from actions of the Oregon Department of Insurance and Finance, reference throughout the petition will be to "Respondent." Qual-Med is retained as a named party that may have an interest in the outcome of the petition pursuant to Rule 12.4.

United Employer Benefit Corporation hereby petitions this Court for a writ of certiorari to the Supreme Court of the State of Oregon to review the judgment in this case.

The actions of the Oregon Department of Insurance and Finance taken in response to the impending bankruptcy of a major medical insurance provider in the Portland area have destroyed the once thriving business of Petitioner United Employer.

The dismissal of Petitioner's federal constitutional claim for just compensation for this taking brought under the Fifth Amendment was summarily upheld by the court below on the ground that no taking had occurred. The trial court had earlier dismissed Petitioner's claim for just compensation on the ground that the property taken was not a protectable "property interest" under the Fifth Amendment. The Court of Appeals held that the actions taken by Respondent which destroyed Petitioner's once-profitable business did not trigger the Fifth Amendment's duty to pay just compensation.

The lower court's failure to recognize the valuable property rights at stake in this case reflects the confusion which exists with respect to the extent to which the Fifth Amendment protects personal property. Equally unclear is the extent to which governments threats of future actions and which destroy vested property rights can trigger the constitutional duty of government to compensate the owner of those rights.

Numerous businesses across the country, such as Petitioner, make investment decisions in reliance upon the

guarantee that government cannot -- even for a noble purpose -- take their property without just compensation. Nevertheless, the decision of the court below allows government to do just that. This Court must, if the integrity of the Fifth Amendment's guarantee is to be preserved, grant this petition for review.

OPINIONS AND ORDERS BELOW

1. The order denying the petition for review by the Oregon Supreme Court, dated May 23, 1995, is reproduced at Appendix A.

2. The opinion of the Oregon Court of Appeals, dated March 22, 1995, is published at 133 Or. App. 477 (1995), and is reproduced at Appendix B.

3. The opinion of the Marion County Circuit Court of Oregon, dated October 21, 1994, delivered orally, and the judgment of that court, entered November 24, 1992, are reproduced at Appendix C.

JURISDICTION

The denial of review by the Oregon Supreme Court was issued May 23, 1995. On August 2, 1995 Justice O'Connor extended the time for filing a petition for a writ of certiorari to September 20, 1995.

This Court has jurisdiction pursuant to 28 U.S.C. § 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Oregon Constitution, article 1, section 18 provides: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation."

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner United Employer Benefit Corporation was formed as a small insurance marketing agency in 1976 doing business in Portland, Oregon. Its primary product was a multi-employer insurance trust package which included medical, major medical, dental, disability and group life insurance from several insurance carriers. Petitioner's in-

house salespeople sold about ten percent of its policies, the others ninety percent of the policies. Petitioner's real revenue, however, came from servicing one hundred percent of the policies.

The health, dental, and major medical insurance in the package all were provided by Greater Oregon Health Service (GOHS), an Oregon health insurer. In the course of business, Petitioner built up a body of customer information that gave it a valuable competitive advantage over other marketers. Under a marketing agreement between Petitioner and GOHS, this customer information base was the property of Petitioner, who retained the right to attempt to transfer its customers' policies to other insurance carriers.

In 1989, Respondent Oregon Department of Insurance and Finance (DIF) placed GOHS into receivership and determined that the most viable way to recapitalize the impaired carrier was to sell its Portland block of business to the highest bidder. The Director, acting as receiver, sold the Portland block of business to an out-of-state carrier for two million dollars. This block of business consisted of cases that Petitioner had marketed and cases that Petitioner continued servicing. Petitioner attempted to negotiate with the purchaser to continue as the servicing agent for these latter cases, but the carrier refused to allow Petitioner to continue servicing the accounts. Petitioner then took the block of insurance customers and proceeded to "roll" them to another carrier. At that point, the out-of-state purchaser of the block of business persuaded Respondent to stop Petitioner from servicing its customers.

Respondent issued a press release notifying all independent agents in Petitioner's network that anyone assisting in the rollover would be held in contempt of court and also took other steps to make certain that Petitioner's marketing network was destroyed.

Consequently, the out-of-state purchaser got not only the carrier's portion of the business but, all within the same purchase price, obtained the agent's portion of the business as well. Needless to say, Petitioner did not receive any of the purchase price collected by the state.

Following this transfer of Petitioner's asset to the out-of-state purchaser, Petitioner's business, valued at approximately $900,000 at trial, was destroyed in a week. Respondent's actions forced Petitioner to lay off twenty-five of its twenty-nine employees, leaving the owners, their two sons and a secretary as staff. The firm was compelled to move to small quarters and the principal shareholder of the corporation, who had personally guaranteed the lease, was required to liquidate assets to satisfy the outstanding lease agreement.

B. Proceedings Below

Petitioner filed an inverse condemnation claim against the Director of the DIF, Respondent, in state court in 1992. The basis for this claim was that the actions by the Respondent had extinguished Petitioner's property right in its customer information base, since Petitioner was not allowed to use the information to solicit Portland customers, despite its contractual arrangement with GOHS granting Petitioner full

ownership of the information base. The trial judge directed a verdict against Petitioner on the ground that Petitioner did not have a protectable property right in the customer information base.

On appeal, the Oregon Court of Appeals assumed that the customer information base was a protectable property right. Despite this, the court ruled that Respondent had not taken any action that could be construed as a "taking" of Respondent's property. Rather, the court reasoned Respondent had merely *threatened* to take future action if Petitioner used its customer information to solicit Portland business. Accordingly, the court found "the government's action must have the *legal* effect of rendering the property useless. The Director's actions raised no legal impediment to the Petitioner's use of the list." *United Employer Benefit Corp. v. Dept. of Ins. and Finance, et al.,* 133 Or. 477, 486 (Or. App. 1994)(emphasis in original) (opinion reproduced at Appendix B).

On May 23, 1995, the Oregon Supreme Court denied a petition for review of the decision of the Oregon Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. This Court, Circuit Courts and State Courts Are Hopelessly Confused Over Whether Personal Property Is Protected Against Uncompensated Regulatory Takings.

The decision of the Oregon Court of Appeals in this case exemplifies the confusion among courts about how much protection to grant personal property under the Fifth Amendment. Here the lower court held that personal property was not taken by Respondent when its threats of legal action forced Petitioner to abandon the use of its property. To reach that conclusion, the court relied on an earlier case in which the Oregon Supreme Court did find government took property by threatening future action. *Suess Builders Co. v. City of Beaverton,* 656 P2.d 306 (1982). Consequently, Oregon's cases would lead one to conclude that the Just Compensation Clause protects real property more vigorously than it protects personal property.

This result stems from the lack of a guiding principle from this Court with respect to constitutional protection for personal property under the Fifth Amendment, particularly personal property owned by those engaged in heavily regulated industries. Prominent commentators have recognized this confusion in the Court's cases and called upon the Court to clarify the protections available to personal property. Lacking definitive guidance from this Court, the law regarding the protection of personal property against uncompensated taking will continue to evolve in an unprincipled, patchwork fashion.

A. This Court's Decisions Have Created Uncertainty About Whether Personal Property Owned by Those Engaged in Heavily Regulated Industry Is Protected To The Same Extent As Land Against Regulatory Takings.

In 1992, this Court rendered its watershed ruling of *Lucas v. South Carolina Coastal Council,* 112 S.Ct. 2886 (1992), which contains language many commentators consider to be the basis for distinguishing between personal property and land in terms of Fifth Amendment protections. In affirming the decade-old guarantee that the Just Compensation Clause requires compensation when all of the economically beneficial and productive use of property has been taken, the *Lucas* Court inexplicably drew a sharp distinction between personal and real property:

> [B]y reason of the State's traditionally high degree of control over commercial dealings, [the owner of personal property] ought to be aware of the possibility that new regulation might even render his property economically worthless" and thus vitiate any duty of the state to compensate for that taking.

Id. at 2899.

The *Lucas* Court implied that land was somehow to be afforded greater protection against uncompensated takings because:

> In the case of land, however, we think that the notion pressed by the council that title is somehow held subject to the 'implied limitation' that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture.

Id. at 2900.

Despite the apparent ease with which this Court drew a distinction between personal property and land, in reality this Court has on numerous occasions held that personal property was entitled to protection against uncompensated takings. Both *Ruckleshaus v. Monsanto Co.*, 467 U.S. 986 (1984) and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) depart sharply from the dicta in *Lucas* concerning the protections afforded to personal property. In *Ruckleshaus*, this court adopted a definition of property that includes a wide range of business interests:

> [T]he perception of trade secrets as property is consonant with a notion of 'property that extends beyond land and tangible goods and includes the products of an individual's labor and invention.

467 U.S. at 1003, *quoting* 2 William Blackstone, Commentaries *405. In *Ruckleshaus*, this Court held that Monsanto had a property interest in its business secrets that those business secrets and were protected by the Just Compensation Clause.

In the leading case of *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155 (1980), this Court was called upon to determine whether interest accruing on an interpleader fund deposited in the registry of a county court was a property interest protected against uncompensated takings under the Fifth Amendment. This Court held that it was and in so doing set forth a definition of property that reflects the original conception of the reach of the Just Compensation Clause.

According to Justice Blackman writing for the *Webb's* Court, protected property is more than "a mere unilateral expectation or an abstract need." *Id.* at 161. The Court continued, "Webb's creditors, however, had more than a unilateral expectation." *Id.* Therefore, the property taken was protected by the Fifth Amendment: "The deposited fund was the amount received as the purchase price for Webb's assets. *It was property held only for the ultimate benefit of Webb's creditors, not for the benefit of the court and not for the benefit of the county.* . . . Eventually, and inevitably, that fund, less property charges authorized by the court, would be distributed among the creditors as their claims were recognized by the court. The creditors thus had a state-created property right to their respective portions of the fund." *Id.* (emphasis added).[3]

---

[3] Other cases this Court has decided support the proposition that personal property is entitled to the same degree of constitutional protection as that afforded to real property. *See, e.g., Armstrong v. United States,* 364 U.S. 40, 44 (1960) (materialmen's liens); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555, 596, 602 (1935) (real estate liens); and *Lynch v. United States,* 292 U.S. 571, 579 (1934) (insurance policies).

Ruckleshaus 467 U.S. 986 (1984), involved the heavily regulated industry of pesticide and insecticide manufacture. This Court had no problem in that case deciding that personal property is fully protected by the Just Compensation Clause. But in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 227 (1986), this Court held that requiring additional employer pension plan payments was not a compensable taking. More recently, in *Concrete Pipe of Calif. v. Laborers Pension Tr.*, 113 S. Ct. 2264, 2275 (1993), this Court stated that "Concrete Pipe's reliance on ERISA's original limitation of contingent liability to 30% of net worth is misplaced, there being no reasonable basis to expect that the legislative ceiling would never be lifted." Thus, based upon these leading decisions, it appears that pension benefits are not entitled to the same degree of protection as real property merely because the pension industry is "heavily regulated."

In this well-established line of cases, courts have held that certain characteristics qualify rights as protected property. These factors include the right to possess, use or dispense of a particular thing. *See Ruckelshaus v. Monsanto,* 104 S. Ct. at 2875; *United States v. General Motors Corp.,* 323 U.S. 373, 378 (1945); and, *United States v. Security Industrial Bank,* 459 U.S. 70, 75 (1982). Nonetheless, this Court's decisions concerning protections afforded to the personal property of owners engaged in heavily-regulated industries remain particularly murky.

B. The Federal and D.C. Circuits are Split on the Issue of Whether Personal Property Held by Those Engaged in Heavily Regulated Industries is Entitled to the Same Protection as Real Property.

The United States Court of Appeals for the Federal Circuit, the court with the unique jurisdiction to hear claims for just compensation greater than $10,000 pursuant to the Tucker Act, 28 U.S. C. § 1491 (a)(1) has concluded that personal property held by those engaged in heavily regulated industries is not entitled to the same level of protection as real property. *See, e.g., Allied-General Nuclear Services v. United States*, 839 F.2d 1572 (Fed. Cir. 1988). The United States Court of Appeals for the D.C. Circuit, the court with the unique jurisdiction to hear all regulatory challenges of national significance, has come to exactly the opposite conclusion. *See, e.g., Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 296 U.S. App. D.C. 281, 197 F.2d 648, 655 n.8 (D.C. Cir. 1992). Because of the specialized jurisdiction of both of these courts, the split between them is particularly significant.

In *Allied-General Nuclear Services*, plaintiff Allied-General had sought and was later denied an operating license for a nuclear power reprocessing plant. After having invested $200 million in building the plant pursuant to government assurances that the license would be granted, Allied-General sought just compensation after the Carter Administration

initiated a nuclear freeze which vitiated any hope for that license.

Upon review, the Federal Circuit concluded that compensation was not warranted for the taking because the nuclear industry is heavily regulated:

> Appellants do not deny they accepted the regulatory scheme so far as it might have resulted in denial of construction or operating licenses on the ground the plant, as appellants would operate it, was unsafe. They deny that nuclear proliferation was within the contemplation of the parties...The attendant circumstances: the novelty of nuclear fission, the fearsome effect of its use in war, the public fears, all forbid us to suppose that the government had committed itself to use its licensing power not to respond to some new ground of hesitation just because it was not originally foreseen.

Allied-General Nuclear Services, 839 F.2d at 1577. The teachings of this case suggest that investors should engage in nuclear projects at their economic peril.[4]

---

[4] Ironically the Federal Circuit took a much different view of personal property rights in a case decided before *Lucas*. In *Yancey v. United States*, 915 F.2d 1534 (Fed. Cir. 1990), the Federal Circuit upheld the Claims Court's determination that plaintiffs had a protected property interest in their health turkey flock that was quarantined under federal law: "[F]or Fifth Amendment purposes, the Yanceys' ownership of their turkey flock deserves just as much protection as if ownership of their farm had been appropriated." 915 F.2d at 1541.

The Federal Circuit further held in the case of *Mitchell Arms, Inc. v. United States*, 7 F.3d 212 (1993), *cert denied*, 114 S.Ct. 2100 (1994), that the pervasive regulation of the industry in which plaintiff was engaged similarly precluded his obtaining just compensation for the taking of his property. In *Mitchell*, plaintiff purchased foreign-made assault weapons, relying upon import permits issued by the United States government. Subsequently, Plaintiff's permits were revoked, and his guns locked from importation into the United States at their ports of entry. The court concluded that reliance upon the permits did not give rise to investment-backed expectations protected by the Fifth Amendment. *Id.* at 215. The court reasoned that Plaintiff's expectations were not protected because it knowingly entered into such an intensely government-regulated arena. *Id.* at 216. Further, the court found that no taking had occurred because Mitchell still retained possession of the guns; only the collateral interest of importing them in their present form was barred by the revoking of the permits. *Id.* at 215.

Notably the D.C. Circuit has considered this Court's analysis in *Lucas* and came to the exact opposite conclusion as the Federal Circuit. In *Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin.*, 197 F.2d 648, 655 n.8 (D.C. Cir. 1992), the D.C. Circuit Court of Appeals tacitly rejected the *Lucas* rationale:

> Although the Supreme Court has suggested that doing business in a regulated field might reduce an enterprise's reasonable expectation of noninterference,

> ...we are unsure how much weight to put upon governmental supervision and regulation in takings analysis. In this era of pervasive regulation, this factor might prove far too much: almost any entity could be said to have a reasonable expectation of governmental intrusion.

In *Nixon v. United States,* 978 F.2d 1269 (D.C. Cir. 1992), former President Richard Nixon had alleged that the taking of his Presidential papers was compensable under the Fifth Amendment. The United States Court of Appeals for the D.C. Circuit agreed, and in so holding also articulated an extremely broad definition of property that is applicable to business interests: "The essential character of property is that it is made up of mutually reinforcing understandings that are sufficiently well grounded to support a claim of entitlement." *Id.* at 1275. *Citing Kaiser Aetna v. United States,* 444 U.S. 164, 179 (1979)(property consists of recognized expectancies)[5]; *Perry v. Sindermann,* 408 U.S. 593, 601

---

5 Some courts (in cases cited with approval in *Nixon*) have gone so far as to suggest that rights created by custom may be so "robust" as to "trump" positive law or common law. *Id.* at 1276. *See, e.g., Ghen v. Rich,* 8 F. 159, 162 (D. Mass. 1881)(usage in finback whaling industry overcomes the common law rule).

Other courts have taken this logic further. In *General Offshore Corp. v. Farrelly,* 743 F. Supp. 1177 (D.V.I. 1990), *aff'd,* 919 F.2d 17 (3d Cir. 1990), plaintiff alleged that the Virgin Islands Wrongful Discharge Act worked a taking of his business because it restricted his

(1972); and *Hall v. Ford,* 856 F.2d 255, 265 (D.C. Cir. 1988).

C. Constitutional Scholars Have Called Upon This Court To Extend The Same Level Of Protection To Both Real And Personal Property In Cases Involving Heavily Regulated Industries.

As noted constitutional scholar Professor Richard Epstein has observed, the logical result of this reasoning articulated by the *Lucas* Court drawing a distinction between land and other forms of property (based upon the expectations of the property owner or how extensively the subject property has been regulated in the past) threatens the integrity of the Just Compensation guarantee itself:

> This analysis leads us, inexorably, to the state's position in *Lucas* -- that if some land use regulation creates the expectation of more regulation, then all

---

right to terminate employees pursuant to provisions of signed employment contracts. The court wrote:

> It seems evident that the right to fire an employee has value to an employer, so, if the contract is a source of a property interest, then the partial deprivation of the right to fire an employee diminishes the value of the contract. The threshold issue must thus be resolved in favor of the plaintiff.

743 F. Supp. at 1202.

land use regulation is constitutional.[6]

Richard A. Epstein, *Lucas v. South Carolina Coastal Council: A Tangled Web of Expectations,* 45 Stan. L. Rev. 1369, 1386 (1992).

Regardless of the reasoning employed, not only does the conclusion that personal property is entitled to less protection than land against uncompensated taking fly in the face of decades of jurisprudence of this Court, it has also understandably led to much confusion among lower courts. As Epstein has explained, "The present takings law is in chaos because of its muddled conceptual foundations." *Id.* at 1392.

Richard Lazarus recently reached the same conclusion. In *Putting the Correct 'Spin' on Lucas,* 45 Stan. L. Rev. 1411, 1424 (1992), Lazarus wrote, "The Court's distinction between the expectations of real and personal property holders does not derive from the text of the Just Compensation Clause, which

---

[6] With respect to the "reasonable expectations" rationale articulated by the *Lucas* Court to explain why commercial property should be entitled to less protection than land for Fifth Amendment purposes, Epstein notes: "There is no reason to allow the imported idea 'reasonable expectations' to divert the Takings Clause from its original purpose. The only expectation that the Framers held when they drafted the Clause was that government would conform its behavior to the requirements of the Takings Clause, whatever those turned out to be. There is no reason to allow a fictional gloss of reasonable expectations to take on a life of its own, where it will necessarily dilute the protection to private property that the constitutional text explicitly provides." Epstein, *supra* at 1386.

appears to apply to 'real' and 'personal' property alike." *See also* William W. Fisher III, The *Trouble With Lucas,* 45 Stan. L. Rev. 1393, 1398 (1992)("One might have expected [the *Lucas* Court] to try to bring some order -- or at least consistency -- to the field. Instead, [*Lucas*] has exacerbated the confusion.")

Without further guidance from this Court, this issue will remain a hopeless muddle. Worse yet, the unifying principle which should guide courts -- the principle set forth in the Constitution -- "Nor shall private property be taken, without just compensation" -- will be evaded by the whim of whatever court which chooses to do so on the ground that the property being taken does not warrant constitutional protection or the even more flimsy premise that the industry is "highly regulated." Accordingly, this Court should grant this petition in order to underscore that states must compensate owners if it takes their property -- whether it be personal property or land.

II. This Court Should Grant The Petition To Determine Whether Government Threats Of Future Actions Which Have The Effect Of Destroying A Thriving Business Constitutes A Taking Of Private Property Under The Just Compensation Clause Of The Fifth Amendment.

Despite the clear directive of the Just Compensation Clause itself and the extensive latitude with which this Court has outlined for the states in enforcing this constitutional mandate,

the court below concluded that the actions taken by the Respondents did not violate the Fifth Amendment because:

> Apart from questions concerning whether [Respondent] may have had the authority... to prohibit solicitation from the customer list, or whether [Petitioner] was, in fact, damaged by those acts, we conclude that the [Respondent's] actions simply were not sufficient to effect a taking ... A mere threat to take action on the occurrence of some uncertain future event is not a taking.... [T]o be considered a taking, the government's action must have the *legal* effect of rendering the property useless The [Respondents'] actions raised no *legal* impediment to [the Petitioner's] use of the list. The fact that many brokers chose not to solicit customers on behalf of [the Petitioner] out of fear of reprisal by [the Respondent] does not give rise to a taking by [the Respondent].

United Employer 133 Or. App. 477 (1975)(emphasis in original).

Under the reasoning of the lower court, as long as the Government does not take any formal legal action, it cannot run afoul of the Just Compensation Clause. This argument has at times been rejected or ignored by lower courts considering the question of what constitutes a taking, but those opinions do not establish any uniform rule for deciding this issue. Moreover, as this Court has never squarely addressed this important issue of what actions can trigger the Just

Compensation Clause, there is no definitive guidance for these courts. Hence, decisions such as those below which allow states to utterly destroy investments and long-standing business enterprises unchecked.

In the broader sense, the court below has limited the class of actions that may constitute a taking, thereby narrowing the scope of the Just Compensation Clause. By broadly holding that the state can take any deterrent action it chooses, even to the point of destroying a thriving business as occurred in this case, and yet not incur any obligation to compensate the owner of the destroyed business, the Oregon Court has encouraged government to take whatever action it pleases so long as the dispositive act can be characterized as a "threat." To prevail under the test articulated below, the Petitioner must show that Respondent had initiated formal legal action that in effect resulted in a taking. *United Employer* 133 Or. App. at 486. Other courts, however -- including this Court and the Oregon Supreme Court -- have concluded that informal government action in a variety of contexts may also amount to a taking. *See e.g., Washington Market Enterprises v. City of Trenton,* 343 A.2d 408 (1975)(discussed *infra).* Nonetheless, the lower courts are hopelessly confused about how to determine whether governmental action has gone far enough to constitute a "taking" in the context of an ongoing business.

The narrowing of the Just Compensation Clause -- excluding arbitrarily a whole class of deterrent or enforcement activities on the hollow explanation that such actions represent merely a threat of a future action -- also defies common

experience. The insurance industry is highly regulated. Hence, even a hint of government action in that industry will understandably elicit response by those regulated. Of course, in this case, the actions taken went far beyond a hint. Rather, the threat posed was clear and direct:

> On July 11, [Respondent] issued a news release that detailed the transaction between Qual-Med and GOHS and stated that [Respondent] would consider any attempt to 'roll-over' the policies purchased by Qual-Med to be a violation of the receivership order:'[Respondent] will monitor any attempts to 'roll over' or replace the policies just purchased by Qual-Med. *'I will view any effect to take over those policies to be in contempt of the court order appointing me as receiver,' warned [the Respondent]. I will take appropriate action against any individuals involved in such activities.'*

United Employer, 133 Or. App. at 483 (emphasis in original) In practical terms, Respondent could only anticipate that its threat of reprisal would force Petitioner to comply.

Ironically, even the Oregon Supreme Court has employed a test inconsistent with the one announced by the court below. In *Suess Builders Co. v. City of Beaverton,* 656 P.2d 306 (1982), upon which the lower court relied, a property owner brought an inverse condemnation claim against a city that had designated the owner's property for use as a transit station and greenway. The city eventually changed its plans, but not before the property lost much of its value while it was frozen

economically by the city's announced intention to condemn the property. On a motion to dismiss the complaint for failure to state a claim, the *Seuss Builders* court saw a potential constitutional cause of action:

> The language [of the complaint] is broad enough to encompass a hypothetical claim *that defendants told plaintiffs that the property was certain to be acquired, that it would be useless to pursue any proposals for private development,* and that defendants began to acquire easements for certain facilities. If that were the case, and defendants later abandoned their plans, a court could find that one or perhaps both of the governmental bodies had temporarily taken all economic use of plaintiffs' property.

656 P.2d at 312 (emphasis supplied). If the lower court in the present case had applied this standard, it would have found a taking in the threats Respondent made to prevent Petitioner from using its customer list for its own profit.

Moreover, this Court has repeatedly held that threats of governmental action have legally cognizable consequences, particularly if constitutional rights are at stake, most notably First Amendment rights. For example, government attempts to suppress the exercise of free speech are considered prior restraints and are unlawful as violative of the First Amendment rights. In *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), this Court held that prior restraints were so repugnant to constitutionally- protected free speech rights, that even if the defamatory criticism of public officials had not been yet

determined to be protected speech under the First Amendment, the state's plans to suppress it were unlawful. Likewise, in *New York Times Co. v. United States,* 403 U.S. 713 (1971), this Court refused to allow the government to enjoin the publication of the Pentagon Papers. Even though a majority of this Court had doubts about whether the classified materials were protected by the First Amendment, this Court nevertheless concluded that the government plan to suppress publication of that material was unconstitutional.

Indeed, all that is necessary for First Amendment protection is that the government action would "chill" the exercise of free expression or association. For example, in *Keyishian v. Board of Regents,* 385 U.S. 589 (1967), this Court recognized that the mere existence of vague statues will deter law-abiding citizens from conduct that may or may not be covered by the law. When such conduct involves speech [according to the *Keyishian* Court], that may be protected by the First Amendment, the "chilling effect" of a vague proscription is unacceptable.

Likewise, in *Lamont v. Postmaster General,* 381 U.S. 301 (1965), this Court held a law unconstitutional that required addressees of Communist political propaganda who lived abroad to affirmatively request delivery of the information before it could be delivered. This Court held that this affirmative obligation infringed First Amendment rights, because the Court stated that the obligation "is almost certain to have a deterrent effect, especially as respects those who have sensitive positions." *Id.* at 307. *See also Baggett v. Bullitt,*

377 U.S. 360 (1964)(invalidation of loyalty oaths on the ground that they "chilled" exercise of First Amendment rights).

A Fifth Amendment parallel of a "chilling" effect destroying fundamental rights is seen in the context of "condemnation blight." Condemnation blight refers to those instances in which a government lets it be known that sometime in the future, it may condemn a certain piece of property. With the government waiting in the wings to swoop in and pay less than top dollar for the property, the value of the property immediately drops. In the case of commercial land, the value of the land can outright plummet. Courts then face the issue of whether the mere threat of condemnation -- which has real, tangible effects on the market place and the value of private property -- can trigger the duty of the government to compensate the owner for that lost value.

In *Washington Market Enterprises v. City of Trenton,* 343 A.2d 408 (1975), the Supreme Court of New Jersey held that threat of condemnation alone is sufficient to trigger the protections of the Just Compensation Clause. "We hold that where the threat of condemnation has had such a substantial effect as to destroy the beneficial use that a landowner has made of his property, then there has been a taking of property within the meaning of the Constitution." *Id.* at 416. *See generally,* Gideon Kanner, *Condemnation Blight, Just How Just Is Just Compensation,* 48 Notre Dame Lawyer 765 (1973).

Likewise, in *Knight v. City of Missoula*, 827 P.2d 1270, 1276 (Mont.1992), the Supreme Court of Montana determined that excessive traffic, dust and runoff from state roads resulted in a taking of the plaintiff's property. The court held:

> A property owner may recover in an inverse condemnation action where actual physical damage is approximately caused to his property by a public improvement as deliberately planned and built.

Id. at 1276.

A source of confusion, although not cited by the court below, might be the doctrine of ripeness articulated by this Court in *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172 (1985), as the touchstone of its analysis. *See, e.g., Tari v. Collier County*, 56 F.3d 1533 (2d Cir. 1995). However the ripeness doctrine set forth in *Williamson County* speaks only to the question of whether a case is appropriate for adjudication. It does not address the question posed by this case: Does the Just Compensation Clause protect property owners against governmental threats that have the effect of destroying their property or is the scope of the protections of the Just Compensation Clause limited to governmental takings instituted by legal action?

In *Williamson County*, this Court addressed cases in which the government has taken some formal, legal action (such as enforcing a regulation); *Williamson County* does not provide the courts with any guidance to determine whether less formal government action or threats of government action also fall within the purview of the Just Compensation Clause.

The broadest, and most natural, reading of the Just Compensation Clause is that it reaches *any* government action that approximately causes the loss of private property. By its refusal to recognize the constitutional implications of Respondent's threats that resulted in the destruction of Petitioner's ongoing business, the lower court failed to recognize the significance of the constitutional rights at stake, namely property rights. As Justice Brennan wrote in *Lamont v. Postmaster General* 381 U.S. 301, 308 (1965): "I think the right to receive publications is . . . a fundamental right. The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." Likewise, the right to use one's property is a fundamental right, as well as is the right to enjoy its productive and beneficial use. This case affords this Court the opportunity to demonstrate that property rights will no longer be "relegated to the standing of a poor relation" vis-a-vis the other rights guaranteed in the Bill of Rights" *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994) by affirming that property rights are indeed a "fundamental right." Further, the Court should make clear that any government action that destroys ongoing businesses, no matter how well intentioned, cannot survive Fifth Amendment scrutiny if just compensation is not paid to the owner for that taking. Accordingly, this Court should grant this petition in order to establish that the threats of Respondent in this case, which destroyed the thriving business of Petitioner, are unconstitutional.

CONCLUSION

However, so long as courts - such as the courts below - feel free to run roughshod over commercial property rights on the rationale that they are economic rights or as the court below did - apparently for no rationale - then the purpose behind the Just Compensation Clause is shattered.

Respectfully submitted,

Nancie G. Marzulla
Counsel of Record
DEFENDERS OF PROPERTY RIGHTS
6235 33rd St., NW
Washington, DC 20015
(202) 686-4197

September 20, 1995

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF OREGON

UNITED EMPLOYER BENEFIT CORPORATION, Plaintiff-Appellant, Petitioner on Review, v. THE DEPARTMENT OF INSURANCE AND FINANCE OF THE STATE OF OREGON, Defendant-Respondent, Respondent on Review, and QUAL-MED OREGON HEALTH PLAN, INC., an Oregon corporation, Defendant-Respondent, Respondent on Review.	Marion County Ciruit Court No. 91C-11561 **ORDER DENYING REVIEW** CA A77744 SC S42230

The Court has considered the petition for reveiw and ORDERS that it be denied.

Dated this 23rd day of May, 1995.

APPENDIX B

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

UNITED EMPLOYER
BENEFIT CORPORATION,
Appellant,

v.

DEPARTMENT OF INSURANCE
AND FINANCE OF THE STATE OF OREGON;
and Qual-Med Oregon Health Plan, Inc.,
an Oregon corporation,
Respondents.

(91C-11561;CA A77744)

Appeal from Circuit Court, Marion County.

Larry T. Coady, Judge pro tempore.

Argued and submitted March 2, 1994.

Before Riggs, Presiding Judge, and De Muniz and Leesoon, Judges.

DEMUNZ, J.

Affirmed.

Plaintiff, United Employer Benefit Corporation (UEBC),

appeals from a directed verdict for defendants, the Oregon Department of Insurance and Finance (DIF)[1] and Qual-Med Oregon Health Plan (Qual-Med), on its takings claims under the federal and state constitutions. UEBC also appeals from a directed verdict for Qual-Med on plaintiff's claim for intentional interference with business relations. We affirm.

UEBC was incorporated in 1976 as an insurance marketing agency and began selling an insurance trust product to small businesses. Norm Geertsen, UEBC's founder and president, explained the concept of the insurance trust:

> "The program was developed primarily because back in the '60s and '70s it was very difficult for small business organizations to buy group life and health insurance at group rates, and the trust concept was to bring businesses of like natures, be it retail, manager, etcetera, together in large pools, business-by-business, and that was the concept of the multi-employer trust."

The trust product included various forms of life, disability and health insurance. Originally, UEBC marketed the North American Life and Casualty (NALAC) trust in combination with a health and dental insurance program from a California insurer. Eventually, UEBC created and began marketing the Oregon Employer Benefit Program (OEBP), an insurance

---

[1] The Department of Insurance and Finance is now the Department of Consumer and Business Services. Or Laws 1993, ch 744, § 10.

package that included life and disability insurance from NALAC and health and dental insurance from Greater Oregon Health Service (GOHS), an Oregon domestic health insurer.

As a marketing company, UEBC worked primarily with independent insurance brokers. It held broker seminars in which UEBC representatives explained OEBP and discussed its benefits. Approximately 90 percent of UEBC's sales of OEBP to small businesses were made by independent brokers, while the remaining 10 percent were made directly by UEBC's sales personnel. According to Geertsen, UEBC's customers were "the group of policyholders out there that are paying the premium, as well as the brokers that we deal with as the go-between[.]" UEBC's income came largely from administrative fees; it charged a flat noncommissionable fee of $17.50 per month per group of policies sold to businesses, approximately $1.50 per individual per month in each group that had health insurance, and $1.25 per individual per month in each group with dental insurance. For the 10 percent of sales made directly by UEBC, UEBC also received the gross commission from the insurer.

Every sale of OEBP generated important customer information about insurance brokers and the individuals in the insured group, including the number and identity of the individual insureds, their geographic location and number of dependents, the type of coverage purchased and the time period during which the policy remained in effect. The information also included the expiration dates for the

customers' policies. Upon completion of each sale, UEBC forwarded that customer information to United Administrators, Inc. (UAI), a related administrative company that processed the data and compiled a customer information list. By 1990, UEBC's customer list of Portland area policyholders contained information on 1,152 insured groups, which included approximately 11,000 individuals. By providing UEBC with the ability to locate and identify OEBP policyholders and the knowledge of when those policies were due to expire, the customer list gave UEBC a substantial competitive advantage over other insurance marketers, in terms of its efforts to retain those policyholders. Only UEBC, GOHS, UAI and Smith Management, the company that managed GOHS, had access to the customer information list.

When the UEBC-GOHS relationship was formed in the 1970's, UEBC and GOHS entered into an oral agreement in which GOHS agreed to supply the health insurance product for OEBP that UEBC marketed. The agreement could be terminated by either party at any time. In the event of such termination, UEBC had the right to "roll over" the policies to a new insurer, *i.e.*, UEBC could use the customer information list to offer competing policies to GOHS policyholders enrolled in OEBP. The agreement was never put in writing.

Due to financial difficulties, GOHS was placed in receivership by DIP in March, 1990. The Director of DIF was appointed receiver by the circuit court and ordered, *inter alia*, to "take possession of all property of [GOHS] and conduct the

business thereof" and to "perform and do all acts *** necessary, advisable or expedient" to achieve the financial rehabilitation of GOHS. When the company went into receivership, it was forbidden from issuing new policies. GOHS informed UEBC to stop maketing its health insurance product, so that no new policies would be written. In fact, due to its concern over the financial stability of GOHS, UEBC had stopped marketing new policies in 1989.

The Director of DIF, acting as the receiver for GOHS, determined that the first step in rehabilitating GOHS was to raise capital by selliung some of GOHS' assets. It was determined that individual and employer group policies that had been issued by GOHS in the Portland area were the most marketable. Roughly two-thirds of those GOHS policies had been sold by UEBC as a part of OEBP. In May, after a bidding process, theDirector and GOHS accepted an offer, made by Qual-Med, to purchase those policies for $2million. Qual-Med then signed a nonbinding letter of intent, which contemplated negotiation of a binding agreement betweeen GOHS and Qual-Med, subject to the Director's approval.

In early June, before GOHS and Qual-Med had reached a binding agreement, Qual-Med learned that Sisters of Providence Good Health Plan was attempting to market a competing health insurance package to the Portland area GOHS policyholders. Concerned that Good Health Plan was directing its marketing efforts toward the precise block of Business that Qual-Med was seeking to purchase, Qual-Med

sent a letter to Terry Meagher, DIF's Chief Examiner of Domestic Insurers, requesting that DIF take steps to stop Good Health Plan, which voluntarily withdrew its solicitation.

Qual-Med also was concerned that UEBC, which had placed two-thirds of the GOHS policies that Qual-Med sought to purchase and which, by virtue of the customer list, possessed customer information on those policyholders, might attempt to direct those policyholders to another insurance carrier. Counsel for Qual-Med telephoned Meagher on June 20 and told him that Qual-Med would not purchase the GOHS policies without an informal assurance that DIF would take action "to protect" the transfer of the policies to Qual-Med. After their conversation, Qual-Med's counsel advised Meagher by letter that Qual-Med "now understands that the Director would intervene to prevent a similar attempt at piracy [referring to Good Health Plan's solicitation efforts in early June], but some risk of adverse marketing before the administrative transfer date remains." Sometime in late June, but before the closing of the sale, Qual-Med officials met with the Director to voice their concerns about the possiblity of UEBC contacting the GOHS policyholders and steering them to another insurance carrier. The Director said that he would do what he could to protect the transfer of the GOHS policies to Qual-Med.

On June 22, Qual-Med and GOHS entered into a binding written agreement transferring the Portland GOHS policies to Qual-Med. Pursuant to the agreement, Qual-Med was to psy

GOHS $2 million and, effective June 30, was to assume the risk of the policies. Notice provisions in the GOHS policies required Qual-Med to provide most policyholders with 30 days advance notice of the termination of their GOHS policy and to inform them that, if they wished, they could obtain replacement coverage with Qual-Med. Qual-Med obtained GOHS' assurance that at least 55 percent of the of transferred enrollees would agree to be insured by Qual-Med, and that, if the figure was not achieved, GOHS would transfer additional contracts from its non-Portland businesd until that percentage requirement was met. The Director approved the plan of acquisition on July 10.

GOHS formally terminated the UEBC-GOHS marketing agreement in early July. In May, 1990, it had appeared possible to UEBC that GOHS would not come out of impairment, and UEBC had started aggressively seeking a new medical and dental insurance carrier to replace GOHS in OEBP. After talking with several different insurance carriers, including Qual-Med, UEBC contracted with Sisters of Providence Good Health Plan to provide health insurance and contracted with Standard Insurance Company of Oregon to provide dental insurance. UEBC and representatives from Good Health Plan then met with several Portland area insurance brokers and urged them to market the Good Health Plan's health insurance package to Portland area GOHS policyholders. UEBC planned to begin marketing the reformed OEBP in July, 1990.

On July 9, Qual-Med learned that Good Health Plan, in conjunction with UEBC, intended, through independent brokers, to renew its solicitation of the Portland GOHS business. Qual-Med counsel immediately contacted legal counsel for DIF and requested in writing that DIF take appropriate action "to prevent this new solicitation from proceeding any further." On July 11, DIF issued a news release that detailed the transaction between Qual-Med and GOHS and stated that dif would consider any attempt to "roll-over" the policies purchased by Qual-Med to be a violation of the receivership order:

> "[DIF] will monitor any attempts to 'roll over' or replace the policies just purchased by Qual-Med. *'I will view any effort to take over those policies to be in contempt of the court order appointing me as receiver,'* warned [the Director of DIF]. *'I will take appropriate action against any individuals involved in such activities .'"* (Emphasis supplied.)

The next day, pursuant to the Director's instructions, Meagher telephoned UEBC and Good Health Plan. He summarized the information contained in the news release and referred to the terms of the court order appointing the Director as GOHS's receiver. He also suggested that legal advice be sought before further marketing was attempted. One week later, representatives from UEBC, Qual-Med, GOHS, Good Health Plan and Standard Insurance met with DIF to duscuss the situation. UEBC expressed its concern about being blocked

by the press release from contacting the Portland customers to solicit their business for Good Health Plan and Standard. The Director suggested that UEBC come to sort of mutally acceptable understanding with Qual-Med. UEBC said that it had already engaged in negotiations with Qual-MED, but they had proved unsuccessful. At that point, the Director

> "became very red-faced and he pounded his fist on the table and he told me [UEBC's representative] in a very loud tone that the Department had just taken $2 million from [Qual-Med] and that if it was a fight I wanted, it was a fight that I would get ***."

UEBC was directed to refrain from marketing attempts aimed at the Portland customer base for six months to one year.

As a result of the press release, insurance brokers refused to attempt to roll-over the GOHS policyholders to Good Health Plan for fear of DIF revoking their insurance licenses. Good Health Plan and UEBC suspended most marketing efforts directed at the GOHS policyholders that were solicited through brokers, but UEBC continued to solicit their own customer base. DIF eased the marketing restrictions in March, 1991, approximately eight months after the press release. At that time, attempts to revive GOHS had failed, and the company was being dissolved. UEBC filed for an injunction prohibiting DIF from further restricting UEBC's right to contact Portland customers. UEBC received assurances from the state that DIF would not interfere in any way with UEBC's marketing. However, because UEBC had been unable to

contact the GOHS policyholders in the eight-month interim, its Portland area customer base had it not been precluded from soliciting Portland-area GOHS policyholders.

UEBC brought this action against DIF and Qual-Med for inverse condemnation, claiming that the actions of DIF and Qual-Med had deprived UEBC of its private property rights in the Portland area block of business without compensation, in violation of the state constitution. UEBC also claimed that DIF's actions violated the federal constitution. Latly, UEBC argued that Qual-Med had tortiously interfered with its business relations by asking DIF to restrain its marketing abilities. UEBC claimed that Qual-Med's request had interefered with UEBC's right under the UEBC-GOHS contract to use the customer list and had interfered with UEBC's prospective contracts with Portland area customers. After a week of trial, the trial court granted defendants' motions for directed verdicts on all claims. With repsect to the inverse condemnation claims, the trial court apparently based its ruling on the premise that UEBC had no protected property interest in the customer list. With regard to the tortious interference claim against Qual-Med, the trial court concluded that Qual-Med could not have interfered with UEBC's contract right to use the customer list because UEBC had no protected right. The court also held that Qual-Med's actions were not unlawful and therefore not tortious with respect to prospective contracts with Portland customers.

On appeal of the trial court's directed verdict for defendants, we view the evidence in the light most favorable to UEBC. *Paulson v. Western Life Insurance Co.*, 292 Or 38, 40 n 1, 636 P2d935 (1981). Resolving all factual inferences in favor of UEBC, the question on review is whether judgment was properly directed as a matter of law. *See Resser v. Bose-Cascade Corporation*, 284 Or 385, 389, 587 P2d 80 (1978).

Plaintiff pled claims of inverse condemnation under both the state and federal constituions, alleging that DIF's actin constituted a taking of private property. We will assume, for the purpose of this opinion, that some things are as UEBC claims them to be: that the customer list is a property interest and that the Director's acts were state action, purportedly taken in his capacity as receiver for GOHS. We cannot, however, accept UEBC's characterization of the Director's acts as a "taking."

DIF promised, through its Director's press release and oral pronouncements, that *if* UEBC solicited customers from the list, *then* DIF would seek a court determination that UEBC was in contempt of the court's order appointing the Director as receiver for GOHS. Naturally, UEBC could have opposed any move by DIF to have it held in contempt; it also could have challenged DIF's actions administratively. *See, e.g.*, ORS 731.240; ORS 183.490. It could have sought an independent determination as to the legality of DIF's action aimed at restricting UEBC's right to solicit customers from the

list. UEBC chose to do none of those things. It disregarded the Director's admonitions and continued to solicit customers from the list, as did other insurers. However, most brokers refrained from soliciting customers because they felt threatened by the Director's actions.

It is not our purpose here to either condone or condemn DIF's acts or to comment on the appropiateness of certain responses to nonbinding agency conduct. *See Johnson v. Dept. of Fish and Wildlife,* 114 Or App 335, 835 P2d 133 (1992). Apart from qustions concerning whether the Director may have had the authority pursuant to ORS 734.220 to prohibit solicitation from the customer list, or whether UEBC was, in fact, damaged by those acts, we conclude that the Director's actions simply were not sufficient to effect a taking under either the state or federal constitution. A mere threat to take action on the occurrence of some uncertain future event is not a taking. As the Supreme Court said in *Suess Builders v. City of Beavrton,* 294 Or 254, 258, 656 P2d 306 (1982), to be considered a taking, the government's action must have the *legal* impediment to UEBC's use of the list. The fact that many brokers chose not to solicit customers on behalf of UEBC out of fear of reprisal by DIF does not give rise to a taking by DIF.

On the tortious interference claim against Qual-Med, UEBC asserts that the trial court erred in determining that Qual-Med's actions were not wrongul. UEBC claims that Qual-Med wrongfully interfered with UEBC's business

relations by asking the Director to prevent UEBC's solicitation of the Portland customers. Although it is not clear whether UEBC is claiming that Qual-Med interfered with the UEBC-GOHS contract that gave UEBC the right to use the customer list or whether UEBC is claiming that Qual-Med interfered with UEBC's prospective business relations with the Portland customers, we assume the latter.

A case for intentional interference with prospective business advantage is

> "made out when interference resulting in injury to another is wrongful by some measure beyond the fact of the interference itself. Defendant's liability may arise from improper motives or from the use of mproper means. They may be wrongful by reason of a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession." *Top Service Body Shop v. Allstate Ins. Co.*, 283 Or 201, 209-10, 582 P2d 1365 (1978).

For UEBC to establish a claim, it must show that:

"'(1) [Qual-Med] intentionally interfered with the proposed relationship;

"'(2) [Qual-Med] interfered either with an improper motive or by using improper means; and

"'(3) As a result [UEBC] was damaged beyond just the fact of interfernce itself.'" *Ron Tonkin Gran Turismo v. Wakehouse Motors*, 46 Or App 199, 208, 611 P2d 658

(1980), *quoting Straube v. Larson*, 287 Or 357, 360, 600 P2d 371 (1979). (Footnote omitted.)

Qual-Med must have known of the plaintiff's prospective relationship and intentionally intrfered with that relationship. *Glubka v. Long,* 115 Or App 236, 239, 8377 P2d 553 (1992).

The parties seem to agree that (1) Qual-Med knew of UEBC's intentions to solicit the Portland customers: (2) Qual-Med interfered wtih UEBC's ability to solicit the Portland customers; and (3) UEBC was damaged. However, the parties disagree about whether Qual-Med's actions were "'wrongul.'" UEBC argues that the trial court erred by finding that Qual-Med's actions were lawful and claims that ther was evidence at trial that Qual-Med violated a "well-established common law rule," the constitution and a statute, ORS 746.160.[2] Qual-Med denies that its conduct was improper or unlawful.[3]

---

[2]UEBC claims that Qual-Med's actions violated the common law rule that insurance agents have rights in their expiration information. UEBC also argues that Qual-Med's actions constituted a taking under color of state authority, in violation of Article 11, section 4. Lastly, UEBC claims that Qual-Med violated ORS 746.160, which provides that no person or insurer, "jointly or severally," shall do any act for the purpose of:

"(3)" Doing anything which is detrimental to free competition in the business or injurious to the insuring public."

UEBC claims that Qual-Med's agreement with DIF was injurious to free competition.

[3] Qual-Med also argues that its actions were a constitutionally privilege exercise of Qual-Med's right to lobby the government. Or Const, Art I, §

The evidence amply supports the conclusion that it was the brokers' response to the issuance of the press release that caused UEBC's injury. UEBC argues that Qual-Med caused DIF to issue the press release. Assuming, for the moment, that the act of requesting the press release would have been wrongful, there is no evidence that Qual-Med suggested or knew of the press release before it was issued. It is true that Qual-Med expressed concern over UEBC's competitive marketing; it sent letters to insurance competitors asking them to voluntarily avoid soliciting Portland customers, and it appears that some companies complied with that request. However, Qual-Med did not seek or issue the press release; DIF did. Even assuming that DIF's action was wrongful, its action was not Qual-Med's. The trial court did not err in directing a verdict in Qual-Med's favor on the interference claim.

Affirmed.

26; US Const, Amend I. Because we hold that Qual-Med's actions were not wrongful, we do not reach the issue of privilege. *Top Service Body Shop*, 283 Or at 210.

APPENDIX C

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

UNITED EMPLOYER BENEFIT CORPORATION,	)	
PLAINTIFF	)	NO. 91C-11561
v.	)	JUDGEMENT
THE DEPARTMENT OF INSURANCE AND FINANCE OF THE STATE OF OREGON, DIRECTOR OF THE DEPARTMENT OF INSURANCE AND FINANCE, and QUAL-MED OREGON HEALTH PLAN, INC., an Oregon domiciled corporation,	)	
DEFENDANTS	)	

OPINION OF THE COURT , DELIVERED ORALLY ON OCTOBER 23, 1994.

I have a large number of things to say. Frankly, I don't want to be interrupted until I'm done.

It was not the intent of the Court even yesterday when I was so angry, growing angry, to allow Mr. Swainson to testify concerning fraud or the sham transaction, because that testimony would put us in the position of trying a case within a

case, and really confuse this cas, plus the prejudicial effect of that testimony would clearly outweigh it's probative value, because even though it has some evidentiary value from the standpoint of the damages, it really doesn't go to the element itself. There are cases where it doesn't matter what the prejudicial effect is because it goes to the very issue or the heart of the case, one of the elements, in which case, obviously, it can be presented. This is not one of those cases.

That doesn't conclude this, however. Something I said yesterday finally sank in. I think way back on the very first day, Mr. Lilly alluded to the fact, when we were talking in chambers about the various motions in limine and so forth, that at some point in this trial a light bulb was going to go off -- and I may be paraphrasing or using my own terminology -- in the Court's brain. The Court was going to be angry about why we were here and why we had wasted soi much time. Well, I must have a really dim bulb, because it took eight days of trial for something to sink in, and that is that there is a fundamental flaw in the entire plaintiff's case.

What I said yesterday was that UEBC's interest in that customer list -- and that interst is derived from the value it has in rolling over potential business, it's not the list itself that has value, it's the use of the list that has value -- that that value derives solely from its agreement with Greater Oregon Health Service or whatever insurance carrier they had been dealing with.

As I mentioned to Mr. Sugerman late yesterday, even if there were no contract here, the Court would have to imply a contract based upon the dealings between United Employer Benefit Corporation and the insurance carrier.

The development of the customer list -- Well, to state it another way: UEBC could not have developed that customer list independent of its right to market insurance products. It was always a principal-agency relationship, and United Employer Benefit Corporation was not the principal, they were the agent; they were the agent of the insurance carriers.

What went wrong in this case is the Court bought into some analogies that, as Mr. Lilly alluded to yesterday, no matter how much we may like analogies, they can lead us down the wrong path. The analogy to Black ACre was never a correct analogy. This was not a tenants-in-in-in-in-common situation or a separately-owned Red Acre; neither one. This was a principal-agent relationship. As an agent, UEBC had only those rights granted to it by the insurance carriers.

Further, there's another flaw here: United Employer Benefit Corporation has the added disadvantage that it's actually one layer removed. Not only is it an agent, but it's not even the direct agent. It markets indirectly -- and I'm ignoring the direct sales because that's really a small part of the business. It was an indirect agent because it marketed through independent agents. Those independent agents were the ones who had the customers who had value. The customers of the agents were the employers, those businesses who had

policies. The policies were with -- between Greater Oregon Health Service and the other carriers, and the employers. As agents, those agents had the right to commissions that were earned. Through that agency, UEBC derived some interest in that it had a cash flow of commisiions and fees, but it certainly was in no better position -- in fact, it was probably in a worse position -- than those direct agents.

The problem with plaintiff's case has been thaty they have tried to, in effect, paint themselves as a superior agency as if they had somehow a higher or greater right than any other agent. That simply is not the law and could not be the law.

This issue has gotten confused because we're dealing with a multi-employer trust. That makes no difference. That particular multi-employer trust was dependent upon all of the elements of the trust. Just as an independent agent marketing a single product, health insurance through GOHS, would have had his business destroyed by the liquidation of GOHS, so, too, does the agent selling a multi-employer trust have its business destroyed by the liquidation of any element of that trust or the trust itself. It doesn't mean that you can't create a new trust by substituting other people in, but it eliminates the value.

The only value that's proven in this entire case is a value that derived specifically from the cas flow generated by these policies. That cash flow, $17.50 and five dollars, depended upon the continuation of the business. The plaintiff has asked the Court and jury to buy into the idea that somehow there was

some other value to this, yet the only evidence of value that was used by the expert was based on the value of the ongoing business, the $17.50 and the five, and a multiple of that. You can't have it both ways. Either you have an independent interest, yoiu have Red Acre, or you have a tenants in common with Black Acre, or you have strictly a contractual principal-agency relationship. You can't have it both ways.

So to establish some independent interest -- Let's assume for a moment they do have the tenants in common in Black Acre situation, then none of that value can be based on the value of the ongoing business through GOHS; none of it. There is no value, because prior to the press releae and prior to any of the phone calls, the value was gone. That block of business had been liquidated. It was partially gone as soon as the receiver was appointed, only partially, but as soon as it was liquidated, which was essentially when the agreement was signed on June 22nd, although there was going to be some time process before all the transfers took place, as soon as it was liquidated there was no cash flow. So how can you base the value of the list on a cash flow that terminated, and already terminated?

So I back up: Again, you can't have it both ways. You can't have both a contractual right and an independent right and then say that the value of the independent right is based upon the value of the contract right, because the contract had terminated. If you didn't have an independent right, then you

had nothing, because the contract had terminated. You had nothing.

What further -- I may go on all morning.

What further intrigues me about this case --

And by the way, this case, I think, is one of the most interesting I've ever had the fortune or misfortune of being a part of, either as a judge or as an attorney. It's fascinating, and I'm sure it's been fascinating for the jurors. They have, to some extent -- They've gotten to hear from people who run big companies. They've gotten to har from what the lay person might call high-powered attorneys. They've heard from a number of witnesses. It would have been very interesting to hear from Ted Kulongoski today, and I'm sure the jury would like to hear that, too, exposure from the person who may be our next attorney general. But in any event, we're not going to get that far.

The point that I was starting to get at -- Now I've lost my train of thought because I got off on that aside. I was talking about having it both ways, and what I'm -- since I can't think of exactly where I was at, I'm going to go back.

The Court's intent this morning is to grant all of the motions for directed verdict. The analysis is as follows: As to the First Claim, which was inverse condemnation against the State Under Article I, Section 18 of the Oregon Constitution, the Court specifically finds that ther was no interest independent of UEBC's agreement with GOHS that could have been taken by the State.

Secondly, that there was no value independent of those GOHS policies that were arguably -- that were sold. As I've already said, the asset here that was valued was the business, the ongoing business that generated this cash flow. That was dependent upon the agreement. That agreement was terminated. There wasn't an independent property interest, and even if there was, no value was taken by the State. I'll get into that further.

I've already said, as to the second point, all evidence of value that's been presented was tied to the value of the ongoing Portland block of business.

Thirdly -- and I've already said this, but I want to make it really clear -- the value of the list was destroyed, not by the press release and not by the phone calls by Terry Meagher to UEBC and Good Health Plan, but destroyed primarily by the liquidation of the Portland block of business, by the receiver selling that Portland block of business to Qual-Med, which it lawfully was entitled to do.

Fourth, the Department of Insurance and Finance -- and from here on I'll say DIF -- DIF may have exceeded it's authority when it acted to prevent United Employer Benefit Corporation from marketing through its agents to the Portland block of Greater Oregon Health Service business by issuing the press release and making the phone calls, threatening contempt. However, even if these actions were construed as a DIF order, not just a threat of future action, but construed as an order of a State agency, thou-shalt-not-do-these-things

can't have resulted in an unconstitutional taking of a valuable property interest because whatever interest UEBC had in the customer list arose out of its agreement with GOHS, which was terminated by the liquidation.

Further, the customers of UEBC was not prevented from doing business through its customers, the brokers, only from marketing health insurance to the Portland block of GOHS policyholders.

Further, UEBC was not prevented from doing business through its customers, the brokers, only from marketing health insurance to the Portland block of GOHS policyholders.

Further, even assuming some right of the plaintiff in th customer list, and assuming that was a valuable property interest, DIF had a right as a receiver of GOHS to regulate the use of the asset as long sas it doesn't deprive plaintiff of the entire use of the asset, and it didn't, because even if there is some independent interest, that independent interest is only -- the independent part of it is not affected, only the part of it that related to GOHS. There's nothing here that prevents or ever prevented UEBC from marketing through those agents to any number of othre people or businesses, other products -- the issue isn't whether it had other products to sell or not; the issue is, was it prevented from doing any business, and so was deprived of all use of its customer list, assuming a property interest. It simply wasn't deprived of that independent use. It could market to other people through those agents, other business, and it could still market throguh

those agents theoretically other forms of insurance, other than health insurance, even during this period in question.

In saying all of this, I'm not buying into the State's illegality argument. It may have some merit, but I'm not buying into that argument.

I'm not buying into the Statue of Frauds argument. I don't think the Statue of Frauds applies.

I am buying in, to some extent, the police power argument that Mr. Lilly actually much more vociferously argued than Mr. Barnes on behalf of the State, but the fact is that DIF, as the receiver, clearly had rights to regulate that block of business because it had a duty to protect the other policyholders of GOHS and to protect its sale, because without that sale, GOHS was clearly going under or was already under, and maybe they were already under anyway, as I think Mr. Swainson finally discovered as he waded through this mountain of records.

I think that covers every point I want to make on the First Claim for Relief.

It certainly -- Just as an aside, I do agree that custom and usage does not create a property interest that arose out of the contract, and the contract didn't create a property interest that survived the press release. If there was an independent interest, we've already discussed the effect on that, and that DIF had a right to terminate GOHS' agreement. GOHS and UEBC by their contract could not create a survivable interest, is what it amounts to.

I'm going to jump now to the Third Claim for Relief, which is the inverse condemnation claim under the Federal Constitution, Fifth Amendment, and simply say the same reasoning applies, and in fact better applies because there's more case authority for the Court's position as to the Federal Constitution than there is to the State Constitution provision. But I'm choosing to interpret both of those provisions similarly.

We have already eliminated the Second Claim for Relief.

The Fourth Claim for Relief, here we need to refer to paragraph 29 of the plaintiff's Sixth Amended Complaint. We have already eliminated as wrongful means, A, C, and E, so I'm not going to talk about those.

B alleges that Defendant Qual-Med used wrongful means by causing DIF to prevent UEBC from exercising its rights in its policy expirations. The Court's already now determined that there were no rights per se in those policy expirations, and in any event, there's no value there because DIF had already liquidated that block of business by making the sale to Qual-Med which they were lawfully entitled to do.

D states: By depriving plaintiff of its rights in its customer list and good will assets in its Portland block of business without payment of money. Well, if there were no independent rights, there were only contract rights, then plaintiff fails on that allegation, and as the Court has alluded, even iof there were some independent rights, the plaintiff was not deprived of those independent rights because it still had a

right to market to its customers other products, and that being true because its customers were the brokers, not the employers who held GOHS policies.

Finally, F states, by causing DIF to restrain UEBC from marketing its products to its customers and clients in the Portland block of business. The Court's ruling here is that simply isn't an unlawful restraint. It may certainly -- Certainly the effect of that was to restrain UEBC from marketing its product to the employers through its agents in that Portland block of business, but that's not unlawful as determined by the Court, so could not constitute any unlawful restraint of trade or restraint of marketing as alleged.

Therefore, UEBC, having failed to make any factual basis for supporting any of the allegations of paragraph 29, there is no factual basis upon which the finder of fact could find that there were wrongful means employed by Qual-Med, and therefore Qual-Med's motion for directed verdict as to the Fourth Claim of tortious interference with contract, is also granted.

At this point, I would like to bring the jury in and excuse them and explain to them what the Court has done, and then we can take up any matters that anyone wishes to put on the record. I would assume that would primarily be on the plaintiff that might have some interest in putting something on the record, or some additional argument on the record, but --

MR. SUGERMAN: Your Honor, I take it this is a ruling.

THE COURT: This is a ruling.

MR. SUGERMAN: My record is made; the Court isn't going to change its mind no matter what I say. Is that correct?

THE COURT: That is correct. I'm not going to change my mind.

MR. SUGERMAN: In that case, I think my record is made and I don't see any reason for wasting the Court's time, frankly.

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF MARION

UNITED EMPLOYER BENEFIT CORPORATION,	)	
PLAINTIFF	)	NO. 91C-11561
v.	)	JUDGEMENT
THE DEPARTMENT OF INSURANCE AND FINANCE OF THE STATE OF OREGON, DIRECTOR OF THE DEPARTMENT OF INSURANCE AND FINANCE, and QUAL-MED OREGON HEALTH PLAN, INC., an Oregon domiciled corporation,	)	
DEFENDANTS	)	

Whereas: This matter came on regularly for trial before the Honorable Larry T. Coady, Circuit Court Judge Pro Tem, beginning October 12, 1992. Plaintiff was represented by David Sugerman and Richard Uffelman. Defendant State of Oregon was represented by Kendall Barnes. Defendant Qual-Med Oregon Health Plan, Inc. was represented by Michael Lilly. Defendants each moved for directed verdict at the close of plaintiff's evidence on October 21, 1992. After having heard oral argument and having considered the evidence in the light most favorable to the plaintiff, the court granted defendant Qual-Med's directed verdict motion as to plaintiff's

Second Claim for Relief on October 22, 1992. The court denied the remainder of defendants' directed verdict motions on October 22, 1992.

Thereafter, defendant Department of Insurance and Finance began presentation of its evidence. On October 23, 1992, on its own motion, the court reconsidered its earlier ruling and granted the remainder of defendants' directed verdict motions.

NOW, THEREFORE, it is hereby ADJUDGED and DECREED that judgment is granted in favor of defendants and against plaintiff on all of plsintiff's claims; that plaintiff take nothing on its claims; and that costs are awarded to defendants.

Judgment Summaries

Money Judgment Number One

Judgment Creditor: State of Oregon, Department of Insurance and Finance

Attorney for Judgment Creditor: Kendall M. Barnes

Judgment Debtor: United Employer Benefit Corporation

Amount of Judgment: $354.69 (all for costs)

Amount of Attorney Fees: $0

Amount of Costs: $354.69

Post-Judgment Accrual Information: $354.69 with simple interest at the rate of nine percent per annum from the day of entry of judgment until paid.

Money Judgment Number Two

Judgment Creditor: Qual-Med Oregon Health Plan, Inc.

Attorney For Judgment Creditor: Michael J. Liily.

Judgment Debtor: United Employer Benefit Corporation

Amount of Judgment: $122.25 (all for costs)

Amount of Attorney Fees: $0

Amount of Costs: $122.25

Post-Judgment Accrual Information: $122.25 with simple interest at the rate of nine percent annum from the day of entry of judgment until paid.

DATED this 20 day of November, 1992.